Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-711 OF 1999

MOHD SAARI, PS GILL AND RICHARD MALANJUM JJCA

20 MAY 2003

Contract *— Conditional contract — Condition precedent to formation of contract — Sale and purchase agreement conditional upon consent being obtained from Foreign Investment Committee within three months from date of agreement — Whether agreement conditional upon consent being obtained from Foreign Investment Committee — Whether requirement to obtain consent was condition precedent — Consent not obtained before expiry of stipulated period — Whether defendant had to refund deposit paid by plaintiff*

Land Law *— Sale of land — Caveat — Application for removal of caveat — Caveat lodged by plaintiff purchaser after payment of deposit — Sale and purchase agreement terminated due to non-fulfillment of condition precedent — Suit by plaintiff against defendant for refund of deposit — Deposit not refunded by defendant — Whether plaintiff required to remove caveat so long as the deposit remained unpaid*

Land Law *— Sale of land — Conditional contract — Consent of Foreign Investment Committee required — Foreign Investment Committee did not object to proposed sale provided that 30% of plaintiff's shares were held by Bumiputera — Whether this amounted to consent — Whether Foreign Investment Committee's letter with condition attached was a conditional consent which met requirement of sale and purchase agreement*

By a sale and purchase agreement dated 21 July 1997 ('the SPA'), the plaintiff agreed to purchase a piece of industrial land ('the said land') from the defendant. A deposit was paid by the plaintiff to the defendant. Clause 16 of the SPA stipulated, inter alia, that the SPA was conditional upon the relevant consent ('the said consent') being obtained from the Foreign Investment Committee ('the FIC') for the sale of the said land within three months from the date of the SPA ('the said period'). In the event of the consent not being obtained or rejected within the said period through no fault of either party then the plaintiff had the option of either granting an extension of time for a duration it deemed fit or terminating the SPA, in which event all monies paid to the defendant would have to be refunded immediately to the plaintiff and the SPA would be deemed cancelled and of no effect. On 6 August 1997, the plaintiff's solicitors wrote to the FIC to apply for the said consent. By a letter dated 17 October 1997, the FIC stated that it had no objections to the proposed acquisition of the said land by the plaintiff provided that 30% of the plaintiff's shares were held by Bumiputera before 31 December 1998 ('the said condition'). The letter of 17 October 1997 was only received by the plaintiff on 22 October 1997, which was after the expiry of the said period. Despite the expiry of the said period, the plaintiff's solicitors wrote a letter to FIC on 27 October 1997 seeking for the waiver of the said condition ('the said appeal'). Pending the reply from the FIC, the

A plaintiff's solicitors wrote to the defendant's solicitors on 2 January 1998 invoking cl 16 of the SPA on the basis that FIC had, vide FIC's letter dated 17 October 1997, refused to grant its consent for the sale of the said land. The plaintiff then wrote to the defendant's estate agent on 6 January 1998 seeking for an amicable consent to cancel the purchase deal due to economic slowdown. No replies were received B from the defendant on these letters. Thereafter, by a letter dated 17 January 1998 (received by the plaintiff's solicitors on 25 February 1999), the FIC rejected the said appeal. On 10 February 1999, the defendant's solicitors wrote to the plaintiff's solicitors informing the latter of the forfeiture of the deposit due to the failure on the plaintiff's C part to pay the balance of the purchase price within the time stipulated in the SPA. Then, by a letter dated 25 February 1998, the plaintiff's solicitors informed the defendant's solicitors regarding the FIC's rejection of the said appeal. This letter went on to state that the conditional consent given by the FIC did not amount to consent and hence the SPA was frustrated. By a letter of the same date, the D defendant's solicitors informed the plaintiff's solicitors that the deposit had been forfeited since the plaintiff chose not to comply with the said condition. Accordingly, legal action was launched by the plaintiff to recover the deposit paid under the SPA. The learned High Court judge allowed the plaintiff's application to enter summary judgment against the defendant pursuant to O 81 of the Rules of the E High Court 1980 ('the RHC') for the refund of the deposit sum and dismissed the defendant's application for summary judgment on its counterclaim under O 14 of the RHC to remove the plaintiff's caveat lodged against the said land. This was the defendant's appeal.

F **Held**, dismissing the appeal:

(1) Clause 16(a)(i) of the SPA stipulated that the SPA was conditional upon the said consent being obtained from the FIC for the sale of the said property. As such, the requirement to obtain the said consent was a condition precedent and thus a contingent condition in the agreement. It was not in dispute that G no consent had been secured before the expiry of the said period as stipulated in the SPA. There was also no evidence adduced to show that the plaintiff had granted or agreed to any extension of the said period. Hence, by cl 16(d) of the SPA, the defendant had to refund the deposit paid. Having failed to do so, the H judgment entered against the defendant by the High Court was therefore proper and appropriate in the circumstances (see pp 162D, 163B–C); *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 followed; *Loo Choo Teng & Anor v Cheok Swee Lee & Ors and another appeal* [2000] 2 MLJ 257 distinguished.

I (2) The said consent had to be obtained within the said period unless extension was given under cl 16(d) of the SPA. By cl 14 of the SPA, time was treated as of the essence. Therefore, any act of

the plaintiff after the said month period should not be taken to its prejudice. If it were otherwise, then cll 14 and 16(d) of the SPA would have been unnecessary. Therefore, contrary to the defendant's submission, the said appeal did not nullify the mandatory effect of cl 16(d) and set the time at large (see p 163D–E).

(3) FIC's letter dated 17 October 1997 was not a consent and the learned High Court judge was correct in this respect. This letter had a condition attached and was a conditional consent which did not meet the requirement of cl 16(d) of the SPA. At any rate, the said letter of 17 October 1997 was only received by the plaintiff's solicitors after the expiry of the three-month period stipulated in the SPA and thus rendered useless (see p 163F–G).

(4) There was no merit to the contention of defendant's counsel that the plaintiff had terminated the SPA before the outcome of the appeal was known. Firstly, there was no unconditional consent obtained from the FIC within the said period. Thus, the question of termination on the part of the plaintiff became irrelevant. Both the letters to the defendant's solicitors and the defendant's estate agent dated 2 January 1998 and 6 January 1998 respectively were superfluous since the condition precedent in the SPA could no longer be performed as the said period had lapsed. The learned High Court judge was correct in concluding that those two letters did not amount to termination of the SPA (see pp 163H–164A).

(5) The defendant had written to the plaintiff on 25 February 1998 to forfeit the deposit even before the due date for the payment of the balance of the purchase price, which was 20 March 1998. Contrary to the defendant's contention, the last date to pay the balance was not 20 January 1998 as cl 1(b) of the SPA did not require the plaintiff to apply for the two-month automatic extension (see p 164A–B).

(6) The caveat was lodged pursuant to cl 17 of the SPA. The purpose was to protect the interest of the plaintiff after the payment of the deposit. Once the deposit was returned to the plaintiff, the caveat should be removed without the need for the defendant to make any formal application. However, in the instant case, the deposit had not yet been refunded to the plaintiff and prima facie, there was no reason at all for the plaintiff to have the caveat removed so long as the deposit remained unpaid (see p 164F–G).

(7) There was no necessity for an originating summons to be filed by the defendant to remove the caveat since there was a pending matter in the nature of the defendant's counterclaim. However, it could not be said that the plaintiff's claim was only monetary in nature and that it had no caveatable interest in respect of the said land. In the first place, the caveat was lodged pursuant to a term in the SPA. Further, if the defendant was now contesting the

A various terms of the SPA, the defendant should not be heard to say that the claim was purely monetary. On this ground, the court was satisfied that there was a bona fide triable issue (see p 165C–E).

B **[Bahasa Malaysia summary**

Melalui satu perjanjian jual beli bertarikh 21 Julai 1997 ('PJB tersebut'), plaintif telah bersetuju untuk membeli sebidang tanah perindustrian ('tanah tersebut') daripada defendan. Satu deposit telah dibayar oleh plaintif kepada defendan. Fasal 16 PJB tersebut C menetapkan, antara lain, bahawa PJB tersebut adalah bersyarat berdasarkan persetujuan yang relevan ('persetujuan tersebut') diperolehi daripada Jawatankuasa Pelaburan Asing ('FIC') untuk jualan tanah tersebut dalam tempoh tiga bulan dari tarikh PJB tersebut ('tempoh tersebut'). Sekiranya persetujuan tidak diperolehi D atau ditolak dalam tempoh tersebut yang bukan disebabkan oleh kegagalan mana-mana pihak maka plaintif mempunyai pilihan untuk sama ada memberikan lanjutan masa untuk satu tempoh yang difikirkan sesuai atau menamatkan PJB tersebut, di mana sekiranya berlaku kesemua wang yang telah dibayar kepada defendan perlu dibayar balik dengan segera kepada plaintif dan PJB tersebut akan E dianggap telah dibatalkan dan tidak berkuatkuasa. Pada 6 Ogos 1997, peguamcara-peguamcara plaintif telah menulis kepada FIC untuk memohon persetujuan tersebut. Melalui sepucuk surat bertarikh 17 Oktober 1997, FIC telah menyatakan bahawa ia tiada bantahan terhadap cadangan pengambilan tanah tersebut oleh plaintif dengan syarat 30% daripada saham-saham plaintif dipegang oleh Bumiputera F sebelum 31 Disember 1998 ('syarat tersebut'). Surat bertarikh 17 Oktober 1997 hanya diterima oleh plaintif pada 22 Oktober 1997, iaitu selepas tempoh tersebut telah luput. Meskipun tempoh tersebut telah luput, peguamcara-peguamcara plaintif telah menulis sepucuk surat kepada FIC pada 27 Oktober 1997 untuk memohon penepian G syarat tersebut ('rayuan tersebut'). Sementara menunggu jawapan daripada FIC, peguamcara-peguamcara plaintif telah menulis kepada peguamcara-peguamcara defendan pada 2 Januari 1998 dengan menggunakan fasal 16 PJB tersebut dengan asas bahawa FIC telah, melalui surat FIC bertarikh 17 Oktober 1997, telah enggan untuk memberikan persetujuannya untuk penjualan tanah tersebut. Plaintif H kemudian telah menulis kepada ejen hartanah defendan pada 6 Januari 1998 untuk memohon satu persetujuan secara persahabatan untuk membatalkan urus janji belian tersebut disebabkan keadaan ekonomi yang lembap. Tiada jawapan diterima daripada defendant berhubung surat-surat tersebut. Berikutan itu, melalui sepucuk surat bertarikh 17 Januari 1998 (yang diterima oleh peguamcara- I peguamcara plaintif pada 25 Februari 1999), FIC telah menolak rayuan tersebut. Pada 10 Februari 1999, peguamcara-peguamcara defendan telah menulis kepada peguamcara-peguamcara plaintif

memaklumkan tentang perampasan deposit tersebut akibat kegagalan di pihak plaintif untuk membayar baki harga belian tersebut dalam tempoh yang ditetapkan oleh PJB tersebut. Kemudian, melalui sepucuk surat bertarikh 25 Februari 1998, peguamcara-peguamcara plaintif telah memaklumkan peguamcara-peguamcara defendan berhubung penolakan FIC terhadap rayuan tersebut. Surat ini seterusnya menyatakan bahawa persetujuan secara persahabatan yang diberikan oleh FIC tidak membentuk satu persetujuan dan justeru itu PJB tersebut terkecewa. Melalui sepucuk surat dengan tarikh yang sama, peguamcara-peguamcara defendan telah memaklumkan peguamcara-peguamcara plaintif bahawa deposit tersebut telah dirampas kerana plaintif telah memilih untuk tidak mematuhi syarat tersebut. Sewajarnya, tindakan undang-undang telah dimulakan oleh plaintiff untuk mendapat balik deposit yang telah dibayar di bawah PJB tersebut. Hakim Mahkamah Tinggi yang bijaksana telah membenarkan permohonan plaintif untuk memasuki penghakiman terus terhadap defendant menurut A 81 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk bayaran balik jumlah deposit dan telah menolak permohonan untuk penghakiman terus defendan berdasarkan tuntutan balasnya di bawah A 14 KMT untuk membatalkan kaveat plaintif yang dimasukkan terhadap tanah tersebut. Ini adalah rayuan defendan.

Diputuskan, menolak rayuan tersebut:

(1) Fasal 16(a)(i) PJB tersebut menetapkan bahawa PJB tersebut adalah bersyarat berdasarkan persetujuan diperolehi daripada FIC untuk penjualan hartanah tersebut. Oleh itu, keperluan untuk mendapatkan persetujuan tersebut adalah satu pra syarat dan dengan itu satu syarat yang bergantung kepada perjanjian tersebut. Ia tidak dipertikaikan bahawa tiada persetujuan telah diperolehi sebelum tamat tempoh tersebut sebagaimana yang telah ditetapkan dalam PJB tersebut. Tiada juga keterangan telah dikemukakan untuk menunjukkan bahawa plaintif telah membenarkan atau bersetuju terhadap apa-apa lanjutan tempoh tersebut. Justeru itu, menurut fasal 16(d) PJB tersebut, defendan hendaklah membayar balik deposit yang telah dibayar. Sekiranya gagal untuk berbuat demikian, penghakiman yang dimasuki terhadap defendan oleh Mahkamah Tinggi adalah oleh demikian betul dan sesuai dalam keadaan-keadaan tersebut (lihat ms 162D, 163B–C); *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 diikut; *Loo Choo Teng & Anor v Cheok Swee Lee & Ors and another appeal* [2000] 2 MLJ 257 dibeza.

(2) Kebenaran tersebut perlu diperolehi dalam tempoh tersebut kecuali lanjutan telah diberikan di bawah fasal 16(d) PJB tersebut. Melalui fasal 14 PJB tersebut, masa dianggap inti pati. Oleh itu, apa-apa tindakan plaintif selepas tempoh bulan tersebut tidak boleh dikira sebagai prejudisnya. Jika ia adalah sebaliknya, maka

fasal-fasal 14 dan 16(d) PJB tersebut adalah tidak perlu. Oleh itu, bertentangan dengan hujah defendan, rayuan tersebut tidak membatalkan kesan mandatori fasal 16(d) dan menetapkan masa pada amnya (lihat ms 163D–E).

(3) Surat FIC bertarikh 17 Oktober 1997 bukan satu persetujuan dan hakim Mahkamah Tinggi yang bijaksana adalah betul dalam perkara ini. Surat ini mempunyai satu syarat yang disertakan dan adalah satu persetujuan secara persahabatan yang tidak mematuhi keperluan fasal 16(d) PJB tersebut. Walau apapun, surat bertarikh 17 Oktober 1997 tersebut hanya diterima oleh peguamcara-peguamcara plaintif selepas tamat tempoh tiga bulan yang ditetapkan dalam PJB tersebut dan oleh itu menyebabkan ia tidak berguna (lihat ms 163F–G).

(4) Tiada merit kepada penegasan peguam defendan bahawa plaintif telah menamatkan PJB tersebut sebelum keputusan rayuan tersebut diketahui. Pertama, tidak terdapat persetujuan tanpa bersyarat yang diperolehi daripada FIC dalam tempoh tersebut. Oleh itu, persoalan penamatan di pihak plaintif adalah tidak relevan. Kedua-dua pucuk surat kepada peguamcara-peguamcara defendan dan ejen hartanah defendan bertarikh 2 Januari 1998 dan 6 Januari 1998 masing-masing tidak diperlukan kerana pra syarat dalam PJB tersebut tidak boleh dilaksanakan lagi disebabkan tempoh tersebut telah tamat. Hakim Mahkamah Tinggi yang bijaksana adalah betul dalam memutuskan bahawa surat-surat tersebut tidak membentuk penamatan PJB tersebut (lihat ms 163H–164A).

(5) Defendan telah menulis kepada plaintif pada 25 Februari 1998 untuk merampas deposit tersebut sebelum tarikh tamat membuat pembayaran baki harga belian, iaitu 20 Mac 1998. Bertentangan dengan penegasan defendan, tarikh akhir untuk membayar baki tersebut bukan pada 20 Januari 1998 kerana fasal 1(b) PJB tersebut tidak memerlukan plaintif memohon lanjutan automatik untuk dua bulan (lihat ms 164A–B).

(6) Kaveat telah dimasukkan menurut fasal 17 PJB tersebut. Tujuannya adalah untuk melindungi kepentingan plaintif selepas pembayaran deposit tersebut. Setelah deposit tersebut dipulangkan kepada plaintiff, kaveat tersebut sepatutnya dibatalkan tanpa perlunya defendan membuat apa-apa permohonan secara formal. Namun begitu, dalam kes semasa, deposit tersebut masih belum dibayar balik kepada plaintif untuk membatalkan kaveat tersebut selagi deposit tersebut masih tidak dibayar (lihat ms 164F–G).

(7) Tiada keperluan untuk satu saman pemula difailkan oleh defendan untuk membatalkan kaveat tersebut memandangkan terdapat satu perkara yang masih belum selesai dalam bentuk tuntutan balas defendan. Namun begitu, ia tidak boleh dikatakan bahawa tuntutan plaintif hanya bersifat kewangan dan ia tidak

mempunyai apa-apa kepentingan kaveat atas tanah tersebut. Pertamanya, kaveat tersebut telah dimasukkan menurut satu terma dalam PJB tersebut. Tambahan pula, jika defendan sekarang ingin mencabar pelbagai terma-terma PJB tersebut, defendan tidak sepatutnya didengar untuk mengatakan bahawa tuntutan tersebut adalah bersifat kewangan semata-mata. Atas alasan ini, mahkamah berpuas hati bahawa terdapat satu persoalan bona fide yang perlu dibicarakan (lihat ms 165C–E).]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3427–3447.

For cases on conditional contracts, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3464–3465.

For cases on conditions precedent to formation of contract, see 3 *Mallal's Digest* (4th Ed, 2000 Reissue) para 2294.

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] MLJ 47 (refd)

Gabriel Ngu Choo Kiong v Julia Voon Jan Choo [1998] 1 AMR 69 (refd)

Jaafar bin Ibrahim v Gan Kim Kin [1985] 2 MLJ 24 (refd)

Loo Choo Teng & Anor v Cheok Swee Lee & Ors and another appeal [2000] 2 MLJ 257 (distd)

National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211 (folld)

Tan Su Sing v Haluan Kreatif Sdn Bhd 8 *Mallal's Digest* (4th Ed, 2000 Reissue) para 2796; [1998] 1 CLJ Supp 407 (refd)

Legislation referred to

Rules of the High Court 1980 O 14, O 32, O 81

Appeal from: Civil Case No MT1–22–344 of 1998 (High Court, Shah Alam)

Ranjit Singh (*CK Yeoh* and *Edward Soo* with him) (*Edward Soo & Co*) for the appellant/defendant.

Zabidi Mohamed (*Kong Kim Leng & Co*) for the respondent/plaintiff.

Richard Malanjum J: Before us is an appeal by the appellant/defendant ('defendant') against two decisions of the learned judge in the court below.

The first decision ('the first decision') is in respect of the granting, of summary judgment pursuant to O 81 of the Rules of the High Court 1980 ('the RHC') to the respondent/plaintiff ('plaintiff) for the refund of the sum of RM608,751 ('the deposit') being the deposit paid by the plaintiff as the purchaser to the defendant as the vendor in connection with the sale and purchase agreement dated 21 July 1997 ('the agreement') for a piece of an

A industrial land held under GM 443 Lot 1010 in the Mukim of Cheras in the district of Hulu Langat ('the said land').

The second decision ('the second decision') is in connection with the application by the defendant for summary judgment on its counterclaim under O 14 of the RHC to remove the caveat of the plaintiff lodged against the said land. Based on the preliminary objection of the plaintiff, the learned B judge dismissed the application.

The pertinent terms in the agreement are as follows:

(a) that by cl 1(a)(i) the deposit represented 10% of the purchase price of the said land;

C (b) that by cl 1(a)(ii) the balance was to be paid to the defendant's solicitors as stakeholder within six months from the date of the agreement which was on or before 20 January 1998;

(c) that by cl 1(b) the defendant expressly agreed to allow the plaintiff an automatic extension of two months to settle the balance of the D purchase price;

(d) that by cl 6, the defendant had the right to forfeit the deposit paid in the event of the plaintiff failing to observe cl 1 of the agreement, that is, the payment of the balance of the purchase price;

(e) that by cl 14 time was of the essence of the agreement;

E (f) that cl 16 of the agreement stipulated, inter alia:

(i) that it was conditional upon:

(a) the relevant consent/approval being obtained from the Foreign Investment Committee ('FIC') for the sale of the said land within three months from the date of the F agreement, that is, by the 20 October 1997 — [sub-cl 16(a)(i) and (b)]; and

(b) the successful removal by the defendant of the private caveat of one Haji Mohd Shahir bin Haji Sanawi. And it was the obligation of the defendant to apply for the removal at its own costs within three months from the date G of the agreement — [sub-cl 16(a)(i) and (c)];

(ii) that in the event of the consent/approval not obtained or rejected within the stipulated time through no fault of either party then the plaintiff had the option of either:

(1) to grant an extension of time for a duration it deemed fit; or H

(2) to terminate the agreement in which event all monies paid to the defendant would have to be immediately refunded to the plaintiff free from any interest and the agreement would be deemed cancelled and of no effect — [sub-cl 16(d)].

I (g) that by cl 17 the defendant authorized and consented to a private caveat to be lodged by the plaintiff against the said land to prevent any further dealings affecting the same; and

(h) that by cl 20 any notice, request or demand requiring to be served by either party to the other under the agreement would have to be in writing and would be deemed to have been sufficiently served.

In order to comply with cl 16 of the agreement, the steps taken were as follows:

(i) On 6 August 1997 the solicitors for the plaintiff applied to the FIC for the consent/approval on the sale of the said land;

(ii) The FIC replied to the application by a letter dated 17 October 1997 which was received by the plaintiff on 22 October 1997 after the expiry of the three months period stipulated in the agreement. In the said letter FIC attached a condition:

> ... FIC tiada halangan terhadap cadangan seperti di perenggan 1.1 tertaluk kepada syarat Dynamic Mould Sdn Bhd mengadakan sekurang-kurangnya 30% ekuiti bumiputera sebelum 31 December 1998.

(iii) that despite the expiry of the period the solicitors for the plaintiff by way of appeal wrote a letter dated 27 October 1997 to FIC seeking for the condition to be waived; and

(iv) that by a letter dated 17 January 1998 and received by the solicitors for the plaintiff on 25 February 1999, FIC rejected the appeal and maintained the stipulated condition.

While the reply to the appeal from FIC was pending, the solicitors for the plaintiff by a letter dated 2 January 1998 wrote to the solicitors for the defendant invoking cl 16 of the agreement on the basis that FIC had refused to grant it's consent/approval for the sale vide the letter dated 17 October 1997.

And by a letter dated 6 January 1998, the plaintiff wrote to the estate agent of the defendant namely, namely Ng Chan Mao Co seeking for an amicable consent to cancel the purchase deal' due to economic slowdown.

There was no reply received from the defendant to both the letters.

However, by a letter dated 10 February 1999, the solicitors for the defendant wrote to the solicitors for the plaintiff informing the latter of the forfeiture of the deposit paid due to the failure on the part of the plaintiff to pay the balance of the purchase price within the time stimulated in the agreement.

Then by letter dated 25 February 1998, the solicitors for the plaintiff informed the solicitors for the defendant about the rejection by FIC of the appeal to waive the condition stimulated. The letter went on to state that the conditional approval given by the FIC did not amount to an approval and hence the agreement was flustrated.

In reply by a letter dated 25 February 1998, the solicitors for the defendant informed the solicitors for the plaintiff that the deposit had been forfeited since the plaintiff chose not to comply with the condition imposed by FIC.

A Accordingly, legal action was launched by the plaintiff to recover the deposit paid under the agreement.

In the first decision, the learned judge in the court below held, inter alia:

(i) that since there was no approval obtained from FIC it meant that the contingent event became impossible to perform and thus the
B agreement became void and frustrated pursuant to cl 16(d) thereof;

(ii) that notwithstanding the appeal to the FIC by the plaintiff for the condition imposed to be waived, that did not amount to the plaintiff abandoning sub-cll 16(b) and (d)of the agreement and that if such was the intention of the plaintiff cl 20 would have been complied with;

C (iii) that the letter of the plaintiff to the estate agent of the defendant did not amount to an act of termination of the agreement by the plaintiff; and

(iv) that the defendant by its letter dated 10 February 1998 purporting to forfeit the deposit paid was in fundamental breach of the terms and
D conditions of the agreement since it was premature. With the automatic extension of two months, the expiry period to pay the balance should have been 20 March 1998.

In the second decision, the learned judge ruled that:

(i) that the defendant should have proceeded by way of O 32 of the RHC
E as there was a pending action in the form of its counterclaim. Alternatively, it could have commenced a fresh proceeding by way of an originating summons;

(ii) that there were triable issues raised by the plaintiff in relation to the O 14 application of the defendant;

F (iii) that the application to remove the caveat was a claim in the nature of an unliquidated damages and hence O 14 application was unsuitable;

(iv) that to maintain the status quo between the parties the caveat of the plaintiff should stay in view of the refusal by the defendant to refund the deposit;

G (v) that the action of the plaintiff had raised a serious question to be tried; and

(vi) on the balance of convenience it was desirable to maintain the caveat.

H Before us, the main complaints of the defendant in respect of the first decision were, inter alia:

(i) that the learned judge erred in concluding that the expiry date to pay the balance of the purchase price was eight months from the date of the agreement when in fact the additional two months should only come into play upon request by the plaintiff and in this case there was
I none. Hence, the termination letter of the defendant dated 10 February 1998 was valid contrary to the finding of the learned judge;

(ii) that the learned judge erred in concluding that the agreement was void for the failure of the plaintiff to secure the consent/approval from FIC on the sale;

(iii) that the learned judge erred in not finding that the letter of the plaintiff dated 2 January 1998 effectively renounced the agreement. And that was further substantiated by its letter dated 6 January 1998 indicating its inability to finance the purchase. Thus, the defendant was entitled to treat the conduct of the plaintiff as anticipatory breach and considered the agreement discharged;

(iv) that the learned judge erred in considering that the time to secure the consent/approval from FIC was crucial when it was irrelevant after the plaintiff appealed to have the stipulated condition waived by FIC. The Act of appealing enlarged the time and cl 16 should no longer be applicable;

(v) that the learned judge erred in not considering that the plaintiff demanded for the refund of the deposit even before the result of the appeal was known.

The requirement to obtain the consent/approval from FIC was a condition precedent and thus a contingent condition in the agreement. This point has been succinctly expressed in *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 where Salleh Abas CJ (Malaya) (as he then was), when delivering the judgment of the Federal Court said at p 218:

> It is therefore obvious that the parties have entered into a contract of sale contingent upon the approval of the transaction by the FIC over which the parties had no control. There was no promise, nor guarantee that such approval would be given. Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled (see *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 KB 297 at p 304 — per Denning LJ — and *Property and Bloodstock Ltd v Emerton; Bush v Property and Bloodstock Ltd* [1967] 3 All ER 321 at p 330 — per Sachs LJ). Until the FIC approval was given liability for further performance remained unenforceable, ie suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled.

It is to be noted that in the present case the wordings in cl 16(a)(i) of the agreement read as follows:

> (a) this agreement is conditional upon:
>
> (i) the relevant consent/approval being obtained from the Foreign Investment Committee for the sale of the said property; ...

The language of the provision is couched in the affirmative unlike in the case of *Loo Choo Teng & Anor v Cheok Swee Lee & Ors and another appeal* [2000] 2 MLJ 257 where the words used in cl 5 of the sale and purchase

A agreement were constructed by this court to be in negative terms (see also *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] MLJ 47).

We have therefore no reason to disagree with the conclusion of the learned judge in the court below on this issue. Thus, it is no longer available to the defendant to say that in fact and in law such consent/approval is not
B required since the plaintiff is a local company. And in this case, it is not in dispute and indeed a fact that no consent/approval was secured before the expiry of the three months period as stipulated in the agreement. There is also no evidence adduced to show that the plaintiff has granted or agreed to any extension of the stipulated period in cl 16. Hence, such failure should trigger the application of cl 16(d) of the agreement and for the defendant to
C comply with the incidental obligations thereof including the refund of any deposit paid. Having failed to do so, the judgment entered against the defendant by the court below is therefore proper and appropriate in the circumstances. On this ground alone, we find this appeal to be without merit and should be dismissed.

D However, for the sake of completeness, we should consider the other argument advanced by learned counsel for the defendant in his attempt to show that the condition precedent was no longer available to the plaintiff. It was submitted that the appeal to FIC had nullified the mandatory effect of cl 16(d) and set the time at large.

With respect, we are not convinced. In our view, the cut off point is the
E three months requirement under cl 16(b) of the agreement unless extension is given under sub-cl (d) thereof. Further, cl 14 provides time being of the essence. Therefore, any act of the plaintiff after the expiry period should not be taken to its prejudice. If it were otherwise then cl 14 and sub-cl (d) of cl 16 would have been quite unnecessary (see *Jaafar bin Ibrahim v Gan Kim*
F *Kin* [1985] 2 MLJ 24 and *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd*).

It was also the submission of learned counsel for the defendant that the letter of FIC dated 17 October 1997 was an approval. With respect, we are of the view that the conclusion of the learned judge in the court below is correct. The said letter has a condition attached and hence, it is a
G conditional approval which does not meet the requirement of cl 16(d) of the agreement. Thus, the reference by the learned judge to the case of *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* is appropriate in dealing with this point. At any rate, the letter itself came after the expiry of the period stipulated in the agreement and thus rendered useless.

H For the above reasons, we do not think there is any merit to the contention of learned counsel for the defendant that it was the plaintiff that terminated the agreement before the outcome of the appeal was known. Firstly, there was no unconditional consent/approval obtained from FIC within the stipulated period in the agreement. Thus, the question of termination on the part of the plaintiff became quite irrelevant. The letters
I to the estate agent of the defendant dated 6 January 1998 and to the solicitors for the defendant dated 2 January 1998 respectively were superfluous since the condition precedent in the agreement could no longer

be performed as the period had lapsed. We agree therefore with the conclusion of the learned judge that the said letters do not amount to termination of the agreement.

Meanwhile on the part of the defendant, it had written to the plaintiff on the forfeiture of the deposit even before the due date for the payment of the balance of the purchase price. It was the contention of learned counsel for the defendant that the two months automatic extension as provided in cl 1(b) of the agreement should be applied for by the plaintiff and since it failed to do so the last date to pay the balance was 20 January 1998. With respect, we cannot accede to that argument. There is nothing in the said clause that demands such an interpretation. Accordingly, the letter of the solicitors for the defendant dated 10 January 1998 served no purpose since by that time the agreement could no longer be performed due to the failure to obtain the consent/approval from FIC. And even if it could be taken that the time to obtain the consent/approval was still running, the letter of the defendant was premature and in breach of the term of the agreement since the last date to pay the balance of the purchase price should have been 20 March 1998.

Incidentally, in its letters to the plaintiff, the defendant did not indicate that the second condition — precedent in cl 16(a) of the agreement had been complied with. However, since the parties did not touch on this issue, we would not dwell further into it.

Accordingly, the learned judge was right in granting the relief prayed for by the plaintiff and we therefore dismiss the appeal against the first decision.

We now deal with the complaint on the second decision.

It is the contention of learned counsel for the defendant that the application for summary judgment under O 14 of the RHC should have been granted by the learned judge instead of upholding the preliminary objections of the plaintiff.

Now, the defendant prayed for the private caveat of the plaintiff to be removed from the title deed of the said land. Thus to consider the issue it is pertinent to note that the caveat was lodged pursuant to cl 17 of the agreement. The purpose was to protect the interest of the plaintiff after the payment of the deposit. And it should have been understood that once the deposit returned to the plaintiff the caveat should be removed without the need for the defendant to make any formal application. However, in this case since the deposit is yet to be refunded the purpose of the caveat remains. Prima facie therefore, there is no reason at all for the defendant to have the caveat removed so long as the deposit remains unpaid. But once refunded, it would be incumbent upon the plaintiff to remove the caveat promptly.

But it is the rejection by the learned judge of the application in limine that upsets the defendant. We have therefore examined the reasons of the learned judge.

In upholding the objection the case of *Gabriel Ngu Choo Kiong v Julia Voon Jan Choo* [1998] 1 AMR 69 was referred to as the authority for holding

A that to remove a private caveat a formal application by way of an originating summons must be adhered to. However, where there is a pending proceeding then O 32 of the RHC should be a proper order to comply with.

Learned counsel for the defendant submitted that since there is a pending suit in this case in the form of a counter claim of the defendant there is no necessity for the defendant to go by originating summons to have the private caveat of the plaintiff removed. And it is further submitted that even if O 32 has not been complied with the plaintiff has not been prejudiced by the use of O 14. Learned counsel is also emphatic that the plaintiff has no caveatable interest since the claim of the plaintiff is only for the return of the deposit — a monetary claim.

C We have considered the points raised and we are in agreement that there is no necessity for an originating summons to be filed to remove the private caveat of the plaintiff since there is a pending matter in the nature of a counter claim. We are of the view that O 32 of the RHC would be more appropriate to rely upon as was suggested in the case of *Tan Su Sing v Haluan Kreatif Sdn Bhd* 8 *Mallal's Digest* (4th Ed, 2000 Reissue) para 2796, [1998] 1 CLJ Supp 407. Moreover, it cannot be said that the claim of the plaintiff is only monetary in nature and hence it has no caveatable interest in respect of the said land. In the first place, the caveat was lodged pursuant to a term in the agreement. And if the defendant is now contesting the various terms of the agreement, it should not be heard to say that the claim is purely monetary. On this ground, we are satisfied that there is a bona fide triable issue. Conversely, if the defendant complies with the first decision by refunding the deposit then it would then be correct to say that in such a case there would no longer be any need for the caveat to remain and thus no issue to be tried.

F For the foregoing reasons, we agree with the learned judge in dismissing the O 14 application of the defendant. It is justified and correct in law and we affirm the second decision accordingly.

We do not think the other points raised by the learned counsel for the defendant and not specifically dealt with herein are of any significance as to warrant us to decide otherwise. Hence, the appeal is dismissed with costs to be taxed and paid to the defendant. Deposit paid to account for taxed costs.

Appeal dismissed.

Reported by Lim Lee Na